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**IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA, PHOENIX DIVISION**

ARCUS EQUITY II, LLC, an Arizona limited
liability company,

Plaintiff,

v.

MISSION CAPITAL ADVISORS, LLC, a
Florida limited liability company;
COMERICA BANK, a Texas banking
association,

Defendants.

COMPLAINT

Case No. _____

Judge: _____

Plaintiff ARCUS Equity II, LLC, an Arizona limited liability company, complains
against the Defendants Mission Capital Advisors, LLC, a Florida limited liability company, and
Comerica Bank, a Texas banking association, as follows:

PARTIES

1. ARCUS Equity II, LLC, is an Arizona limited liability company (“ARCUS”) with its principal place of business in Maricopa County, Arizona.

2. Mission Capital Advisors, LLC, is a Florida limited liability company (“MCA”) located in West Palm Beach, Florida, with offices in New York, NY, Austin, TX, Newport Beach, CA, and Palm Beach Gardens, FL.

1 “Kent, Mission Capital is please to award you the
2 following asset from the COMERICA Bank 4Q2010 loan
3 sale: Bee Canyon, LLC - \$1,200,000....”
4

5 The communication from Tobin went on to state that ARCUS needed to accept the award of the
6 Bee Canyon Asset and wire a ten percent (10%) non-refundable deposit to MCA/COMERICA
7 by December 3, 2010 (the “Earnest Money”). A copy of this communication is attached hereto
8 as **Exhibit “C”** and incorporated herein by reference.
9

10 11. On December 2, 2010 at approximately 5:08 p.m. (Arizona Time), ARCUS
11 accepted the MCA/COMERICA award of the Bee Canyon Asset and confirmed that it would
12 wire the ten percent (10%) Earnest Money the following day. A copy of this written
13 communication is attached hereto as **Exhibit “D”** and incorporated herein by reference.
14

15 12. At this time, ARCUS also executed, signed, and delivered COMERICA’s Loan
16 Sale Agreement (the “Agreement”) to MCA/ARCUS. The Loan Sale Agreement is attached
17 hereto as **Exhibit “E”** and incorporated herein by reference.

18 13. On December 3, 2010, ARCUS wired its ten percent (10%) Earnest Money to
19 MCA/COMERICA. A copy of the Earnest Money wire from ARCUS to MCA/ARCUS is
20 attached hereto as **Exhibit “F”** and incorporated herein by reference.
21

22 14. On December 8, 2010, ARCUS initiated a wire transfer to MCA/COMERICA
23 for the balance of the Purchase price for the Bee Canyon Asset. A copy of the wire containing
24 the balance of the Purchase price for the Bee Canyon Asset is attached hereto as **Exhibit “G”**
25 and incorporated herein by reference.
26

27 15. That same day, December 8, 2010, Tobin left a voicemail message for ARCUS
28 stating that “COMERICA has a bit of an issue with [the Bee Canyon Asset].”

1 16. After exchanging several voicemail messages, Tobin emailed ARCUS stating,
2 “COMERICA has advised me that the Cut Off Date you filled in the agreement you executed
3 does not work for them and therefore they will not counter execute the agreement you sent.” A
4 copy of this written communication is attached hereto as **Exhibit “H”** and incorporated herein
5 by reference.

6
7 17. On December 9, 2010, the following day, ARCUS emailed Tobin and provided
8 the email chain of communication, including the elements of offer and acceptance of the
9 purchase, and expressing that ARCUS did not have an issue with the cut-off date. **See,**
10 **Exhibits B-C.**

11 18. That same day, in response to the email message from ARCUS, as set forth
12 above, Tobin responded to ARCUS by stating that “I [Tobin] probably should have run that
13 date by the bank prior to suggesting it would work.” ARCUS replied back to Tobin by asking
14 if COMERICA had signed the Agreement and/or if they were backing out of the deal. A copy
15 of these written communications is attached hereto as **Exhibit “I”** and incorporated herein by
16 reference.
17

18
19 19. That same day, in response to the email messages set forth above, Tobin replied
20 by stating that COMERICA had not signed the Agreement. A copy of this written
21 communication is attached hereto as **Exhibit “J”** and incorporated herein by reference.

22 20. On or about December 14, 2010, ARCUS spoke with Tobin on the telephone.
23 Tobin stated that COMERICA was cancelling “the deal” and would be returning the ARCUS
24 Earnest Money that had been wired. Later that day, the Earnest Money and the balance of the
25 Purchase price were returned to ARCUS.
26
27
28

1 21. During the same telephone conversation, as set forth above, Tobin suggested
2 that a “break-up fee” be paid by MCA/COMERICA to ARCUS. Tobin suggested some
3 possible fee amounts.

4 22. After the telephone conversation, as set forth above, ARCUS attempted to reach
5 MCA/COMERICA for several weeks with no response.

6 23. On or about January 18, 2011, representatives of MCA/COMERICA and
7 ARCUS participated in a telephone conference. During this telephone conference, ARCUS
8 expressed its desire and willingness to move forward with the Purchase, but
9 MCA/COMERICA stated that it had already worked something else out and could not sell to
10 ARCUS.
11

12 24. Since January 2011, ARCUS has made numerous attempts to contact
13 MCA/COMERICA and MCA in an attempt to find a reasonable resolution to COMERICA’s
14 decision not to move forward with the Purchase; MCA/COMERICA have not responded to
15 ARCUS’s attempts to contact it to discuss a resolution.
16

17
18 **CAUSE OF ACTION**

19 (Breach of Contract against COMMERCIA and MCA)

20
21 ARCUS incorporates by reference the foregoing allegations above as if fully set forth
22 herein.

23 25. MCA/COMERICA and ARCUS, entered into a contract whereby ARCUS
24 obtained the right for the Purchase of the loan portfolio.

25 26. The Earnest Money and balance of the Purchase price tendered by ARCUS to
26 MCA/COMERICA were fair and reasonable consideration for the contract.
27
28

1 27. ARCUS has performed all conditions, covenants, and promises required of it by
2 the contract.

3 28. MCA/COMERICA has breached the contract and violated its covenant of good
4 faith and fair dealing.

5 29. ARCUS has been damaged by MCA/COMERICA's breach of the contract and
6 violation of the covenant of good faith and fair dealing.

7 30. ARCUS is entitled to a judgment in its favor and against MCA/COMERICA for
8 the breach of contract, including actual and consequential damages in an amount to be
9 determined at trial, including interest, attorney fees, and costs.
10

11 **PRAYER FOR RELIEF**

12 **WHEREFORE**, based upon the facts and allegations set forth above, ARCUS prays for
13 the following relief:
14

15 1. Under the Cause of Action, judgment against the Defendants,
16 MCA/COMERICA, jointly and severally, in a precise amount to be proven at trial, but in no
17 event less than \$4,408,335.76.
18

19 2. Under the Cause of Action, judgment against the Defendants,
20 MCA/COMERICA, jointly and severally, for attorney fees and the costs of this litigation.

21 DATED this 21st day of July, 2011.
22

23 s/Aaron C. Huber
24 Aaron C. Huber
25 Bryan W. Barney
26 **HUBER BARNEY & ARNOLD PLLC**
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